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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LETICIA LOPEZ,

Plaintiff and Appellant,

v.

MYLOAN VU,

Defendant and Respondent.

D048744

(Super. Ct. No. GIC852032)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

In a civil case a dismissal with prejudice operates as a retraxit. That is, it prevents the plaintiff from bringing another claim against the defendant based on an invasion of the primary right or rights asserted in the dismissed action.

In this case the plaintiff initially filed an action against the defendant and other medical professionals growing out of the death of her newborn child. The plaintiff alleged, among other matters, the defendant had signed a death certificate which

concealed the circumstances surrounding the death of her child and as a consequence the medical examiner did not perform a post-mortem examination of the child. Following the defendant's deposition the plaintiff dismissed her initial claims against the defendant with prejudice.

After the plaintiff filed the dismissal, the plaintiff discovered that a few days after the child's death, the defendant had filed a second death certificate, which the plaintiff alleges also falsely set forth the circumstances of her child's death. The plaintiff filed a second complaint against the defendant, in which she alleged the defendant's execution of the second death certificate and her failure to disclose it gave rise to claims for breach of fiduciary duty, abuse of process, concealment and negligence. She later filed a first amended complaint in which she re-alleged her claims. The defendant filed a demurrer to the first amended complaint and the trial court sustained the demurrer without leave to amend. We affirm.

The second death certificate did not constitute a separate invasion of the plaintiff's rights. It was at most additional evidence the defendant had failed to accurately document the cause of the infant's death; that failure on the defendant's part was the subject of the initial action and the plaintiff's dismissal of the defendant from that action foreclosed any further claim.

PROCEDURAL SUMMARY

A. Initial Malpractice Action

In her initial malpractice action, plaintiff and appellant Leticia Lopez alleged the death of her newborn was caused by the negligence of physicians attending the delivery.

In the initial action Lopez alleged she suffered from gestational diabetes and that labor was induced following an examination which indicated the child was under some distress. Lopez alleged her son was born without a pulse because the attending physician used excessive force over a long period of time to overcome a shoulder dystocia, a risk associated with Lopez's diabetic condition.

Lopez alleged the defendant hospital's pathologist falsely prepared a pathology report which suggested the baby's death was the result Lopez's failure to manage her gestational diabetes. In particular, in the initial action Lopez alleged: "Each of the Defendants was obligated by law to cause an autopsy of the infant in these circumstances by the Coroner's Office. Their failure to report the death of the infant was done intentionally to conceal the cause of death of the Plaintiffs' baby."

According to the fifth amended complaint in the initial malpractice action, defendant and respondent Myloan Vu, a pediatrician called to attempt to revive Lopez's child following delivery, participated with the other physicians in the conspiracy to conceal the cause of the child's death. Lopez further alleged that six months after the child's death, she had the child's body exhumed and had an autopsy performed. According to Lopez's complaint, the results of the coroner's examination were inconsistent with the results reported by the hospital's pathologist.

On March 15, 2004, Lopez filed a request to dismiss Vu as a defendant with prejudice. The trial of Lopez's claims against the remaining defendants occurred in January 2005. At trial Vu testified on behalf of the defendants and was impeached with a death certificate she had signed on January 6, 2003. The January 6, 2003, certificate

listed as the cause of death "SPONTANEOUS IUFD, NON TRAUMATIC" and listed "MATERNAL DIABETES MELLITUS" as significant condition contributing to the death of the fetus. This contradicted a December 31, 2002, "FETAL DEATH CERTIFICATE WORKSHEET" which Vu had also signed; the worksheet listed "cardiorespiratory failure" as the cause of death and did not list another condition as contributing to the death.

B. The Instant Action

On August 8, 2005, Lopez filed the instant action against Vu. By way of a first amended complaint in the instant action, Lopez alleged that in preparing and filing the death certificate worksheet and the January 6, 2003, death certificate, Vu was attempting to conceal the true cause of her child's death. In particular, the first amended complaint in the instant action alleges:

"23. Defendant VU had been in a fiduciary relationship with the Plaintiff in regard to the treatment of the Plaintiff's baby. Therefore, Defendant VU had a duty to disclose to the Plaintiff all material facts regarding any aspect of the condition of the Plaintiff's baby and facts regarding the cause of its demise during the delivery. Specifically, the Defendant had a duty to tell the truth regarding any ascriptions she made of the cause of demise of Baby Lopez.

"24. Defendant Vu had a duty to disclose the fact that she had executed a second FDC [Fetal Death Certificate] on or about 1/6/03. In violation of that duty, the Defendant not only failed to disclose the fact that she had executed a second F.D.C., she actively and fraudulently concealed and denied the fact that she that she executed a second FDC and

had sent it to the mortuary. If the Defendant had not concealed the facts regarding the actual cause of death of the Plaintiff's baby, a proper Coroner's autopsy would have been performed on the baby, according to the law, as the baby could not have been buried without it. This would have disclosed the actual cause of death. There would have been no need to subsequently exhume the baby's remains in order to conduct a medical examiner's autopsy." Lopez alleged Vu's conduct gave rise to causes of action for breach of fiduciary duty, abuse of process, intentional concealment, constructive fraud, negligent misrepresentation, and negligence per se.

Vu filed a demurrer to the first amended complaint, arguing it was barred by Lopez's earlier dismissal of the initial malpractice action. The trial court sustained the demurrer without leave to amend. Judgment was entered and Lopez filed a timely notice of appeal.

DISCUSSION

I

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] [H]owever, it is error for a trial court to sustain a demurrer when the plaintiff

has stated a cause of action under any possible legal theory." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

"Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion. [Citations.] Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citation.]" [Citation.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

II

Like the trial court, we find Lopez's first amended complaint is barred by the doctrine of retraxit. "A dismissal with prejudice is the modern name for a common law retraxit. [Citation.] Dismissal with prejudice under section 581 'has the same effect as a common law retraxit and bars any future action on the same subject matter. [Citations.] Dismissal with prejudice is determinative of the issues in the action and precludes the dismissing party from litigating those issues again. [Citations.] 'Relevant language providing for a plaintiff's voluntary dismissal with prejudice was introduced into section 581 to limit the plaintiff's leeway to abandon a case and then refile it. [Citations.] The statutory term "with prejudice" clearly means the plaintiff's right of action is terminated and may not be revived.' [Citation.]" (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820-821.) Importantly, "[t]he bar raised by a dismissal with prejudice is equal, under the doctrine of res judicata, to the bar raised by a judgment on the merits.' [Citation.]" (*Ibid.*)

"Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. . . . Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action.' [Citation.]

"California law defines a 'cause of action' for purposes of the res judicata doctrine by analyzing the primary right at stake: '[A] "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] A pleading that states the violation of one primary right in two causes of action contravenes the rule against "splitting" a cause of action. [Citation.]' [Citation.] "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery. [Citations.]'" [Citation.]" (*Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1169-1170.)

Here, in the initial malpractice action, Lopez asserted she had a right to have a post-mortem examination of her son performed by the coroner and Vu, along with the others, interfered with that right by concealing the true cause of the child's death. In the instant action Lopez reasserts she had a right to a post-mortem examination and Vu

interfered with that right by producing a death certificate worksheet and death certificate which concealed the true cause of the child's death. Most importantly, each of the causes of action set forth in the first amended complaint in the instant action is predicated on Lopez's right to a post-mortem examination performed by the coroner and Vu's invasion of that right. Because the instant action is based solely on the rights alleged in the initial malpractice action, it is barred by the doctrine of retraxit.

Contrary to Lopez's argument on appeal, the holdings in *Neil Norman, Ltd. v. William Kasper & Co.* (1983) 149 Cal.App.3d 942, 947 (*Neil Norman*), *Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150, 155 (*Allied Fire*) and *Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 69 (*Nakash*), do not permit Lopez to relitigate her right to a coroner's post-mortem examination. In *Neil Norman* the plaintiff agreed to purchase 10,000 acrylic sweaters and 7,800 wool sweaters from the defendant manufacturer. By letter of credit the plaintiff paid the manufacturer \$110,000 for the sweaters. Because the wool samples the plaintiff examined were defective, the plaintiff sued the manufacturer and sought a refund of the \$60,000 cost of the sweaters. The manufacturer agreed and the lawsuit was dismissed. The plaintiff buyer then discovered the acrylic sweaters were also defective. In finding the initial settlement did not operate as a retraxit with respect to the buyer's claims related to the acrylic sweaters, the court stated: "'The truth is that we have to know whether it would be vexatious and unjust to bring two actions before we can tell whether a 'cause of action' is being 'split.'" [Citation.] [The buyer] here did not 'maintain' more than one action on the same contract. Rather, it brought suit at the time of the first breach, then dismissed it pursuant to a

compromise settlement (consideration for which was the price of the wool sweaters), allowing [the manufacturer] to continue performance under a remaining portion of the contract. [Citation.] [The buyer] should not be penalized solely for its election to treat the late delivery and defective wool sweaters as only a partial breach, a course to which it was entitled as an aggrieved buyer. [Citation]." (*Neil Norman, supra*, 149 Cal.App.3d at p. 949.)

The court in *Allied Fire* reached much the same result in disposing of separate contract rights which arose in the context of a subcontract for a government construction contract. Because the government delayed construction, it was obligated to make delay payments to the general contractor, who in turn was obligated to share the delay payments with the contractor. The subcontractor and general contractor reached a settlement with respect to the first delay payment the government had made. Then, during the course of discovery in a separate contract dispute, the subcontractor discovered the general contractor received a second undisclosed delay payment from the government. In holding a second action on the second delay payment was not barred by the doctrine of res judicata, the court stated: "Res judicata is not a bar to claims that arise after the initial complaint is filed. These rights may be asserted in a supplemental pleading, but if such a pleading is not filed a plaintiff is not foreclosed from asserting the rights in a subsequent action. [Citation.] The general rule that a judgment is conclusive as to matters that could have been litigated 'does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated [citations].' [Citation.]" (*Allied Fire, supra*, 127 Cal.App.4th at p. 155.)

In *Nakash* the plaintiffs brought an initial action in which they alleged the sale of a substantial portion of stock in their company should be rescinded because of fraud committed by the buyers and the failure of the buyers to perform promises made in exchange for the stock purchase. The plaintiffs reached a settlement with the buyers and dismissed their initial lawsuit. Thereafter, the buyers allegedly engaged in a series of separate activities which damaged the value of the company. The plaintiffs brought a second action in which they alleged the buyers' post-settlement conduct gave rise to a new right of rescission. In finding the second action was not barred by res judicata, the court stated: "Just as an agreement may produce more than one primary right, or produce more than one transactional nucleus of facts, the conduct of parties to the agreement may provide the evidentiary basis for obtaining rescission on more than one ground, on more than one occasion. The transactional nucleus of facts which generated the second complaint occurred *after* the first judgment." (*Nakash, supra*, 196 Cal.App.3d at p. 70.)

The record here is in one important respect like the records in *Neil Norman, Allied Fire* and *Nakash*. The record here discloses two nuclei of events, which gave rise to separate primary rights upon which Lopez could bring separate claims. The first nucleus of events was the death of Lopez's son, which in Lopez's initial action she attributed to the negligence of the attending physicians, including Vu. The second nucleus of events was the effort of the physicians, including Vu, to conceal the cause of the child's death and prevent a coroner's post-mortem. The critical difference of course is that, unlike the circumstances discussed in *Neil Norman, Allied Fire* and *Nakash*, here *both* of Lopez's primary rights *were* the subject of the prior action and were disposed of by the dismissal

with prejudice entered in Vu's favor. Contrary to Lopez's argument, the primary right which arose by virtue of the alleged effort to prevent a coroner's post-mortem cannot itself be divided into separate causes of action denominated by the individual pieces of evidence which demonstrate the invasion of that right. Such a division of a single nucleus of events violates the primary rights doctrine. (See *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.*, *supra*, 110 Cal.App.4th at pp. 1169-1170.)

In sum the trial court did not err in sustaining Vu's demurrer to the first amended complaint. Where, as here, it does not appear from the record the plaintiff can remedy a defect by way of amendment, the trial court may sustain the demurrer without leave to amend.

Judgment affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.